

## CONTINGENCY DUAL STATUS COMMANDER: BALANCING TITLE 10 AND 32 RESPONSIBILITIES

BY

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## **ABSTRACT**

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Since the natural disaster Hurricane Katrina, there are many writings concerning command and control (C2) of military forces responding to disasters. The 2007 National Defense Authorization Act attempted to correct the shortcomings in C2, especially with regard to the ability of the President to call the National Guard in times of natural disaster. However, the legislation was not acceptable to the state governors, which led to the removal of the legislation. It is only a matter of time until a disaster forces the federal and state governments to consider C2 while in a complex environment. This paper will examine the challenges of command and control when considering the use of Title 10 and Title 32 forces operating in a coordinated response to a natural or man-made disaster. Taking into account the differing points of view between the federal and state governments, the paper will examine the current proposal to create a Contingency Dual Status Commander during the execution of consequence management operations, the possible points of friction resulting from this solution and a longer-term solution to better align the state and federal military response.





## CONTINGENCY DUAL STATUS COMMANDER: BALANCING TITLE 10 AND 32 RESPONSIBILITIES

Since the formation of the United States, the military has supported civilian authorities across a wide spectrum of events. As defined by the Federal Research Division, Library of Congress, Military Support to Civilian Authorities (MSCA), also now referred to as Defense Support to Civil Authorities (DSCA), occurs during a state emergency declaration supported by a presidential emergency declaration or during a National Special Security Event. Support is required due to a natural or man-made disaster or National Special Security Event, which requires assistance to civilian authorities at the local, state or federal level to help manage a crisis, attack, or calamity.<sup>1</sup> These events can be small in scale or very large, affecting several states; in most cases, the disaster has reached a size or level of destruction that requires additional support from the state or federal level and an emergency or major disaster declaration allows this support to occur. In some of these events, the military might have specialized capabilities or additional manpower not readily available to civilian authorities. This support can come in the form of National Guard or federal military forces. Problems may arise when concerns of state sovereignty conflict with the power of the U.S. President when a natural or man-made disaster occurs and federal military support is required. In the United States, the governors are the Commanders in Chief of their state's National Guard and the President is the Commander in Chief of Title 10 forces. Both the governors and the President must preserve their legal authority to command and control their forces appropriate to their troops' status, depending on whether in a Title 10 or a Title 32 role. Due to the nature of their state and federal legal

authorities, legal challenges may arise when the two forces co-mingle to perform domestic missions. Co-mingling forces may also break the chain of command, for either the Title 10 or Title 32 force, from their civilian leader; that chain was a basic tenant held by the framers of the constitution when they were ensuring civilian control of the military. Placing either a National Guard or federal officer in command of their respective titled forces was their method of ensuring maintenance of the appropriate chain of command. The shared goal has not changed since the writing of the constitution; it is to place state and federal assistance at the right place at the right time. When conducting consequence management in a politically and environmentally complex situation, state and federal governments will not have time to determine the finer details of federal support. In order to minimize the loss of life and property, policies must ensure the right amount of support is available at the right place and at the right time. To achieve this goal all of the actors must agree, in advance of a disaster, on how to provide a wide spectrum of flexible support from the federal government during times of state need.

This backdrop created the challenges of command and control when considering the use of Title 10, active federal forces, and Title 32, members of the National Guard. This paper will examine how we currently coordinate execution of consequence management during a natural or man-made disaster. It will emphasize the importance of understanding the differing points of view between the federal and state governments, examine the current proposal to create a Contingency Dual Status Commander during the execution of consequence management, and identify the

possible points of friction resulting from this solution. Finally, it will offer a longer-term solution to align the state and federal military response.

Joint Publication (JP) 5-0, Joint Operation Planning, discusses the challenge of understanding any operational environment and, in this case, how each set of actors view operational problems through a different lens; different perspectives have led to different definitions and points of view about the use of the Contingency Dual Status Commander (CDSC). The current situation is extremely complex and interconnected among factions of political leadership, the military structure and historical precedence.<sup>2</sup> Several legislative acts affect the military's response to a request for assistance. In addition to legislation, history offers several examples in which MSCA has worked well and others where it has not met expectations for success. The friction about command of the National Guard and federal forces, while executing consequence management, is rooted in Federalism and the conflict between states rights and the federal government. Unity of effort, for the military, during a no-notice or imminent disaster that requires responding to the needs of the people, is an end-state that the actors at all levels of government wish to achieve. It is important to discuss legal limitations when combining state and federal efforts to appreciate the complexity of the problem. Though laws direct and guide the governments in the United States, there are often minor changes in law or policy that makes it possible to reach goals that previously eluded us.

### Legislative Background

There are three major legislative limitations or constraints on military support to civilian authorities. This legislation is the basis and guide for any military action within the United States. Two basic principals have evolved from the early history of the United States and continue to evolve to meet changing circumstances. The Posse

Comitatus Act and the Insurrection Act were early tenets for the use of force by the United States Army; the Acts were in response to experiences with the British Army prior to and during the Revolutionary War. The older of the two bills is the Posse Comitatus Act. Taken from Latin, Posse Comitatus is the “power of the country” or “the force of the country” which dates back to English law established in the 15<sup>th</sup> century.<sup>3</sup> With the break from British rule and the creation of our nation, the use of the military against the civilian population was important to the framers of the constitution. However, the framers did not specifically place limits on the Army from acting against the citizens of the new nation, but rather balanced its control between the President and the Congress. They established checks and balances between command of the Army, exercised by the President, and its’ funding by the Congress.<sup>4</sup> Laws regulating the ability to use the militia and the army had only a few small changes in the period up to the Civil War. The use of the Army during reconstruction led Southern Democrats, during the Grant Administration, to propose more control over the Army’s ability to conduct operations in the United States against citizens of the country. Matt Matthews in his history of Posse Comitatus Act and the Army, states, “... there can be little doubt that the Posse Comitatus Act was a direct result of the Army’s involvement in Reconstruction and the military’s involvement in Grant’s campaign against the (Ku Klux) Klan.”<sup>5</sup> This rise against the aggressive policies of the North changed the definition of Posse Comitatus and created a law that continues to affect the employment of the military within the United States.

Modified through the mid-twentieth century to include its application to the Navy, Marine Corps and the Air Force, through policy not law, the law received its first major

clarification in 1973, resulting from the siege and associated law enforcement activities at Wounded Knee where the Army and National Guard supplied assistance and equipment to federal law enforcement officials. Due to the Army's actions 83 years earlier against the Sioux at Wounded Knee, the federal government wanted to prevent similar events by limiting military involvement in law enforcement activities.<sup>6</sup> During their trial, the defense team for members of the American Indian Movement (AIM) contended, in one of the lines of defense, that the military's involvement violated the Posse Comitatus Act. It took years of litigation, but the courts did what Congress had been unable to do; it gave a legal description of what the Army could do in support to law enforcement. The courts placed military support into two types of activities, active or passive; the courts prevented the Army from conducting active support but allowed the support in the form guidance, material support and basic intelligence activities.<sup>7</sup> The courts were able to give the Army and, by this time, the military, clear guidance on the lawful types of support to law enforcement. The act had evolved from preventing federal forces from interfering in the governance of states in the south to clearly defined areas of support during law enforcement events and activities. As defined by Sean McGrane, the Posse Comitatus Act finds in its roots "the idea that military personnel are trained to act in circumstances where defeat of the enemy, rather than the protection of constitutional freedoms, is the paramount concern; and that applying such a mindset to domestic law enforcement would be a significant 'danger' to the rights of Americans."<sup>8</sup> Posse Comitatus and the Posse Comitatus Act, along with the Insurrection Act of 1807 have guided military use in the nation for over 100 years

Continuing the checks and balances found in the Constitution, the Congress has the power to call the militia but the President is the Commander in Chief of the militia once called to federal service.<sup>9</sup> The Insurrection Act allows the President to call the military to service in domestic situations. The act has its roots in the 1792 Calling Forth Act and the Judiciary act of 1789; both pieces of legislation clarified the use of the militia, the power of the federal marshal and the ability to call the military in execution of the marshal's duties.<sup>10</sup> These Acts also had very specific guidance for the President, working in conjunction with the courts, to call the militia. The Insurrection Act gave the President the ability to call the militia to service when the laws of the United States are not being followed or the application of the laws are being obstructed.<sup>11</sup> The act provides the President a clear path to follow in any situation where calling the militia is required. One of the key requirements of the act was the President must issue a dispersal order, giving time for the insurrection to end prior to calling the militia to enforce federal laws.<sup>12</sup> The first use of the law was during the Whiskey Rebellion in 1794 when President George Washington moved to disband a large number of insurrectionists in Western Pennsylvania.<sup>13</sup> The call up of the militia ended with little bloodshed and a return to normalcy in the counties affected by the insurrection; this was the first use of the militia to support the laws of the federal government. President Washington's successful use of the Calling Forth Act and the dispersal order written by Alexander Hamilton, which gave extremely clear guidance and instructions, was an endorsement of the laws. Some of the more stringent parts of the act were removed to allow future Presidents more flexibility to apply the act.<sup>14</sup> Several Presidents invoked the act in the latter part of the 20<sup>th</sup> Century to protect civil rights in the south, aid in

hurricane recovery and respond to the Los Angeles riots in 1992.<sup>15</sup> During each of these cases, the President executed the act in a different manner and situation. In some cases, the state governor requested assistance and in others, the President acted without a governor's approval or request. For example, to enforce school desegregation in the south during the 1950s and 1960s, the President invoked the Insurrection Act to use the National Guard to enforce federal law. The Posse Comitatus Act and the Insurrection Act work hand-in-hand when considering calling the military to operate within the United States.

The origin of the Stafford Act is in the expansion of the federal government's power to help end the depression in the 1930's. The New Deal and the creation of federal agencies to oversee its projects created a situation where the government was more involved in funding and assisting the response to major disasters.<sup>16</sup> This worked with President Roosevelt's policies for recovery of the United States from the depths of the Great Depression. However, until 1950, disaster recovery and federal funding had little structure and each disaster response was different from previous responses. It was the Civil Defense Act and the Disaster Relief Act of 1950 that established the current methodology behind disaster response and the bottoms-up approach for requesting assistance from the federal government.<sup>17</sup> The federal response continued to grow in scope through the middle 20<sup>th</sup> Century and in 1979 the creation of the Federal Emergency Management Agency consolidated all of the federal programs that were involved with federal emergency response.<sup>18</sup> In 1988, the federal response to natural disasters received further clarification with the Robert T. Stafford Disaster Relief and Emergency Assistance Act. The Stafford Act provided a framework for federal

response to natural disasters. It created the current process in which state governors declare a state emergency or major disaster area and, in turn, request federal assistance from the President.<sup>19</sup> The Stafford Act further strengthened the Federalism approach to disaster response and recovery. The state requesting assistance must first expend all options within their state emergency response plan before being eligible to receive federal assistance. Although there is no guarantee the President will issue a federal declaration for the emergency or major disaster, which invokes the Stafford Act, he is likely to do so when the requesting state has met federal minimum requirements.

Each of these acts defines and places constraints and limitations on the military's ability to operate within the United States. The acts give a framework to both state and federal levels of government during situations where military use may be required within the United States. The acts are rooted in federalism, balancing states' sovereignty with the federal government's authority. One of the key features of each act is its evolution over time to meet the needs of the government while responding to current events based on the failure or success of previous federal responses.

#### Post 9-11 Adjustments and Reorganization

Legislation directing federal forces' response to disasters has been mostly a reactive process. In the case of the Stafford Act, the focus is the ability of the government to support the population or reduce suffering after a natural disaster. In the Posse Comitatus Act, the intent is to prevent the Army from conducting operations against United States citizens and the Insurrection Act is to address situations where states are unable or unwilling to enforce federal law. Before the terrorist attacks of September 11, 2001, these three acts did not align and changed independently of each other. Established in March of 2003,<sup>20</sup> due to the attacks on 9/11, the Department of



Homeland Security (DHS) placed many small agencies and departments under one cabinet umbrella to improve the federal response to disasters. In response to the attacks, the federal government consolidated authorities to increase the government's ability to detect and respond to possible future attacks. The federal government's reorganization had unintended effects on support to civil authorities; in their rush to establish an organization that oversaw the safety of the homeland, they did not anticipate unintended effects of adding an additional layer of bureaucracy to agencies that had functioned for many years without a higher-level organization. The Federal Emergency Management Agency (FEMA) was one of the organizations that had operated very effectively without specific cabinet level oversight, but its placement under DHS helped streamline the coordinated response to terrorist acts and natural disasters.<sup>21</sup> At the time the consolidation made sense, especially with the 9/11 attack and the difficulties encountered when organizing the federal response to a homeland emergency.

The first significant test, post 9-11, of DHS came in late summer of 2005, with the response to Hurricane Katrina. With the linkages and historical partnerships to FEMA broken, the agency struggled to achieve the expectations of the public and elected officials. Even after removing political rhetoric and unfounded finger pointing, the response to the disaster did not meet the public's threshold for an acceptable response from any agency or level of government. This led to the Post Katrina Emergency Management Reform Act of 2006 that attempted to correct some of the gaps in the organization, structure and operation of DHS.<sup>22</sup> The corrections continued with the 2007 National Defense Authorization Act, which gave the President the authorization to

mobilize the National Guard in response to a terrorist act or natural disaster.<sup>23</sup> These changes in the provisions of a current federal law increased the President's ability to respond to crisis within the United States. However, most of the state governors and their adjutants general did not agree with this increase of the President's power and reduction of state rights. The states responded with overwhelming pressure on the federal government, resulting in the striking of the natural disaster provisions of the law.<sup>24</sup> The removal of these provisions prevented the state governors from losing authority over their National Guards. As discussed in the article *A Brief History of the Evolution of United States Disaster Policy*, the government has shown three stages in reacting to disasters,

The specific reactionary relationship of the government can be observed in three evolutionary policy stages from the mid-nineteenth century to the present. During stage one, there is a loose government initiative in respect to implementation and coordination of policies at all levels of government, with little attention given to future events. In stage two, the government takes on a more assertive role, however the state and local government units are predominantly responsible for mitigation and relief efforts. Entering into stage three, disaster policy begins to stray from the prior two stages in that the federal government attempts to meld national security and disaster policy together.<sup>25</sup>

As the federal government attempted to consolidate the federal agencies conducting consequence management, there was also an attempt to streamline the President's ability to marshal all of the resources available to execute consequence management as quickly as possible. However, the governors' perception was that the act was a movement towards control of the National Guard without the approval of the governors, a move that was contrary to the principle of dual sovereignty and the balancing of state and federal power. Currently President Obama has established a "Council of Governors" to provide the Executive Branch advice on homeland security

and matters relating to the National Guard. The Council of Governors is comprised of 10 state governors, five from each party and representing states from across the nation.

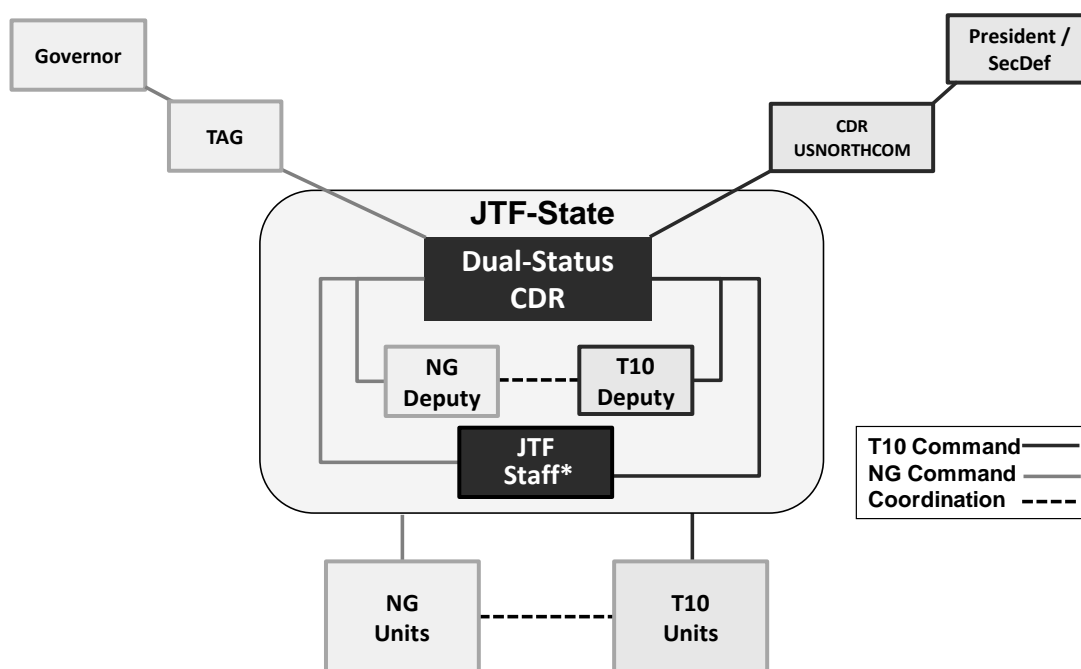
<sup>26</sup> This council gives the governors access to the President on matters relating to the National Guard and eliminates the impression that the states' opinions do not count, an impression given by the content of the 2007 National Defense Authorization Act. The National Guard Bureau (NGB), Department of Defense (DOD) and U.S. Northern Command (USNORTHCOM) are working in conjunction with the National Governors Association and the Adjutants General Association to solve coordination problems. At this point discussions have begun, but a resolution is not imminent. The removal of the original language of NDAA 2007 created a gap between the governors and President when requesting Title 10 personnel and assets to support state activities in response to an imminent or occurring natural or man-made disaster. This gap creates issues and concerns for military organizations due to the lack of unity of effort, which is a basic tenet of military leadership. This unity is extremely important to the disaster response; alignment ensures state and federal resources have the correct level of use and are available at all times.

#### Dual Status Commander

Under the dual status commander (DSC) concept, the commander would be able to respond to command and control needs of both the state governor and the President.<sup>27</sup> The issue of meeting the needs of the governor to protect and secure the citizens of his state, balanced with the needs of the President to maintain control of federal forces, is crucial to this success of this alternative. The current and agreed upon solution for National Special Security Events entails establishing a DSC to serve as the Joint Task Force Commander of both Title 10 and Title 32 forces. This solution allows

military commanders to serve in both Title 10 and Title 32 capacities during the event. Key to the DSC concept is the separation of authorities to ensure Title 32 and Title 10 maintain their distinct lines of command and tasks while the concept is in operation.<sup>28</sup>

As seen in the diagram below, the DSC has two chains of command and the two chains operate separately from one another. It however, “provides a common operating picture to both sovereigns, thereby allowing for greater efficiency, less redundancy and greater unity of effort.”<sup>29</sup>



\* J2, JAG and J3 Staff Elements will retain separate NG/T10 functions

### Dual Status Commander Wire Diagram<sup>30</sup>

Unity of effort occurs when the same officer, the commander, is responsible for both constructs while conducting operations, has the ability to understand and see the concept of operation for both elements and can quickly see and assess the friction

between the two. To clarify, dual status revolves around the commander, not the command. This ensures the separation between state and federal forces, a separation that would otherwise limit the possibility of commanding both forces simultaneously.<sup>31</sup> This eliminates duplication and increases efficiency since the commander must understand the legal constraints for using Title 32 and Title 10 forces. The commander must manage each separately and the overall structure is set up to prevent Posse Comitatus issues or challenges seen at Wounded Knee in 1973.<sup>32</sup>

Executed successfully at several National Special Security Events (NSSE), discussions have begun about the DSC model and its use during consequence management situations. When applied to consequence management situations, the DSC model is referred to as the Contingency Dual Status Commander concept or CDSC. During a NSSE, all of the actors are able to meet before the event, work through issues, and select a DSC who has approval from the Governor and the President. Considering the DSC model for consequence management will require detail conversations between the states' military departments and the DOD. Unlike a NSSE, an imminent or no notice disaster requires the military to move quickly. As seen during Hurricane Katrina, public opinion forced political action after the response was well underway. National Guard and aviation assets were in the disaster area within days. The National Guard responded with 40,000 Guardsmen in 96 hours; the Air National Guard provided most of the airframes used to move them.<sup>33</sup> Coordinated with a conference call, the National Guard was able to respond quickly to the disaster however, the media and public from outside of the disaster zone held the opinion that the federal government was not moving quickly enough to minimize suffering. Elements

of the 82<sup>nd</sup> Airborne Division and the 23<sup>rd</sup> MAGTAF provided the federal military response.<sup>34</sup> Due to the lack of a unified effort, federal military and National Guard forces had overlaps and duplications in their efforts to clear the city.<sup>35</sup> If a CDSC had been in place, the commander would have been able to prevent duplication of efforts and conserve resources during the response.

The main difference between an NSSE and CM is time available to respond. Time is required to ensure the necessary agreements are in place, the commanders have met their Title 32 and Title 10 staffs and there is a basic understanding of the requirements for consequence management. As with any plan or operation the enemy, or in this case the disaster, has a say as to where the disaster is located and when it occurs. The plan may not be developed and personnel may not be available or ready. A key to the entire process is to conduct all of the leadership and much of the personnel selection and education prior to a disaster.<sup>36</sup> It is essential that states select officers who have the ability to make it through a federal vetting process, by USNORTHCOM and the President, which allows the selected officer to take command of Title 10 forces during a disaster response. In concept, the officer would be in the Title 32, National Guard and the Title 10 chains of command.

### Friction

During a consequence management event there is usually friction among at least some of the actors involved. Key actors include the media, the population, elected officials at several layers of government, non-governmental organizations and the commanders of the military organizations participating in the response. Clausewitz discussed how friction causes one to fall short of the intended goal, in part due to the human nature of the individuals involved in the action.<sup>37</sup> Some of this friction starts with

the limitations and constraints placed on the military by current laws, as discussed above, as well as public opinion and political guidance due to public opinion. Military leaders must work to reduce this friction prior to an event occurring. One of the ways to reduce friction is to create doctrine that aligns all elements within the Department of Defense. For example, the draft version of FM 3-28, Civil Support Operations, does not fully align with concepts from USNORTHCOM.<sup>38</sup> The current challenge with the CDSC is that legalities and common understanding of the mission are still undefined, which is creating a situation where a solution is in the process of being implemented but the outlying actors are creating doctrine and policy without understanding the current relationships among USNORTHCOM, NGB and the State Adjutants General. Having a common picture and understanding of the process will minimize the friction prior to an event occurring and while managing the consequences of the event. Once the CDSC is in place and responding to a crisis, friction will develop around the CDSC and his reporting to both the Title 32 and Title 10 chains of command. The ability to forecast tensions would be extremely difficult, but developing relationships between the selected CDSC and likely Title 10 deputy commanders and staff would minimize operational friction during an event. As with all military actions, friction will develop; however, it is the mitigating steps prior to developing the CDSC that will reduce friction to manageable levels.

#### Long Term Solution

To develop a long term sustainable solution, a change is needed to allow the National Incident Management System (NIMS) and Incident Command System (ICS) to function as designed: to facilitate and assist state and local agencies in any crisis.

(NIMS) provides a systematic, proactive approach to guide departments and agencies at all levels of government, nongovernmental organizations, and the private sector to work seamlessly to prevent, protect against, respond to, recover from, and mitigate the effects of incidents, regardless of cause, size, location, or complexity, in order to reduce the loss of life and property and harm to the environment.<sup>39</sup>

Within the NIMS framework, the ICS is the management methodology that incident leadership follows when responding to any type of event that falls within the purview of NIMS. The ICS is a collaborative team process that allows participation from any organization that is a stakeholder in the event the ICS is managing. The National Response Framework (NRF), which is the structure that gives national level policy for incident management, would require restructuring to place the military under the NRF and ICS during times of implementation.<sup>40</sup> A change to NIMS and the ICS will allow the military to be a more active member of the incident command structure and would allow the military to become fully integrated and participating member in the disaster response. Currently, as discussed in FM 3-28, the military does not abandon its mission command and operational methods to conform to NIMS. However, they adapt their operating procedures to interface with the other governmental agencies.<sup>41</sup>

This change for the military would have two consequences; the civilian heads of the military would remain in charge of their responding forces through the CDSC and would remain participating members of the ICS, much like a coalition framework or our participation in the North Atlantic Treaty Organization. The ICS provides resources and a framework for the requested federal support and its strength is that it provides a framework for operating as a collective rather than using a federal or state agency in the lead.<sup>42</sup> NIMS and the ICS provide a very well rounded and tailored response to any emergency. In addition, municipalities who receive federal funds under NIMS must



agree to follow and participate in the ICS when required. This option places the resources from both the federal and state levels on equal footing and would place the command structure for the military in the ICS and the NRF.

In addition to creating a CDSC, finding a long-term solution is necessary before response to a future disaster provokes public opinion and politics to force externally driven change. The states did not accept the legislation contained in the 2007 NDAA, largely due to a lack of consensus building with the governors prior to the laws approval. The federal government could build consensus with the states about calling the National Guard to service, but discussions would have to be open and include a select group of governors that represented the National Governors Association. This mechanism is already in place with the President's Council of Governors. The proposed law that would have given the President authority to call the National Guard without approval of the state governors is an excellent example of how difficult it is for all interested parties to read and understand an entire bill prior to making it law. A small section of the bill slipped into the law with little or no review. However, with the participation of the state governors in an open and frank discussion about how to improve response to disasters, the actors could agree on changes that would approve the call up of the National Guard while insuring state sovereignty.

The concept of a Contingency Dual Status Commander during disaster response is a highly charged political issue. One should not downplay the perceived threat to the authority of the governors or the President. However, many elected officials want to avoid the political fallout similar to that seen after the Hurricane Katrina response. Anticipating political considerations in the discussion would allow the CDSC option to be

successful and elected officials, in conjunction with their respective military organizations, should see this option as a means to minimize the loss of life, property and resources.

The stakeholders in this issue approach the problem with widely different points of view. They all have the common interest of coming to a resolution, but each approaches the issue with a differing perspective. It is only a matter of time until a disaster forces the federal and state governments to consider unity of command and effort while in a complex environment. Understanding the differing points of view between the federal and state governments is extremely important to determine a feasible and long-term solution before a disaster forces the actors to make rushed and possibly less than optimal decisions.

#### Recommendation

The CDSC concept is the correct process to manage and create unity of effort during a consequence management operation. USNORTHCOM, in conjunction with NGB and the adjutants general, must create a vetting process that meets the needs of Title 10 organizations, but recognizes the requirements of the National Guard. The vetting process must allow adjutants general to submit qualified officers from within their commands; in turn, USNORTHCOM must have a series of courses that develop the skills of the selected officers, while maintaining their traditional National Guard status. These courses should include training exercises with possible Title 10 staffs who may respond as the federal portion of the CDSC's force during a consequence management event. During the current series of mobilizations, many senior National Guard officers have operated at battalion or above organizations in support of contingency operations and have operated with Title 10 staffs and senior level commanders. Tabletop

exercises or other staff training would develop effective working relationship between the selected CDSC and Title 10 staff. The National Guard must also select alternate CDSC officers for their plan, in case the primary selectee has civilian business or other conflicts and cannot serve. The alternate could be a deputy commander or another brigade commander from the same state. To ensure that USNORTHCOM training occurs and builds necessary long-term relationships, the assignment of federal forces must be by FEMA region. In some situations, the Title 10 staff may be from another service due to location and regional availability of Title 10 forces. Developing long-term relationship is paramount to the success of the CDSC. If the commander has worked with the Title 10 and Title 32 staffs, success will be easier to attain.

Each state must develop officers who are qualified to become DSCs. Selecting a Title 10 officer for the DSC position fails to take advantage of the strength of having an officer from the state who knows the environmental and political landscapes; this would give some of the rights of the National Guard to federal forces if a state cannot fill the DSC position.

### Conclusion

The most feasible solution to the problem of effective command and control of combined state and federal forces is the Contingency Dual Status Commander Concept. This decision is feasible due to the lack of legislation needed for implementation. One key to the DSC Concept's feasibility is that it is a policy change rather than a legislative change, which allows for quick implementation and closes the gap created by the 2008 NDAA. The Contingency Dual Status Commander Concept is also sustainable by requiring officers to be approved prior to a disaster occurring. The number of Dual Status qualified officers is a metric that is measurable for each state,

and can be used as an indicator of that state's level of preparedness for a no-notice or imminent disaster. The CDSC option also allows for a legislative long-term solution by establishing a program consistent with a legislative solution that changes the Stafford Act to allow Contingency Dual Status Commanders when a state governor declares a state emergency or major disaster. A change in the Stafford Act would be consistent with current legal uses of Contingency Dual Status Commanders for responses using combined state and federal forces. It would also allow the CDSC to serve as a member and, when appropriate, lead in the Incident Command System. A legislative change should be a long-term goal to take advantage of the systems that are already in place, but is unlikely until a failure in disaster response forces the system to change. The Contingency Dual Status Commander allows the National Guard and the DOD to become partners in the solution. However, there are several pitfalls with the CDSC concept. The largest of these is the approval process for Title 32 soldiers chosen as the possible National Guard DSC. As much as the National Guard has participated in operations overseas, there is a lingering doubt among many in DOD that a National Guard officer has the ability or skill to lead federal soldiers. A solution requires the active component to acknowledge that there are qualified National Guard officers who are capable of serving as Contingency Dual Status Commanders. The most important problem to address is the effective response to natural disasters to minimize the loss of lives and property while conserving the resources of both the state and federal governments. The response to Hurricane Katrina had successes, but the initial response from state and federal governments was not effectively coordinated and lacked unity of effort. Elected officials must focus on the task of approving legislation

designed to avoid repeating these failings. They must also insure that a discussion about the Contingency Dual Status Commander Concept occurs at all levels to address concerns and friction points prior to a disaster occurring. The state and federal governments must make the hard decisions sooner rather than later. These decisions will help Americans recover from disasters and strengthen positive public opinion about the effectiveness of our military and civilian leadership.

### Endnotes

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<sup>2</sup> Joint Chiefs of Staff, *Joint Publication 5-0, Joint Operation Planning*, Washington D.C., 26 September 2006, III-17.

<sup>3</sup> Matt Mathews, *The Posse Comitatus Act and the United States Army: A Historical Perspective*, Combat Studies Institute Press, Fort Leavenworth, KS, 2006, 5.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid., 33.

<sup>6</sup> Ibid., 41-42.

<sup>7</sup> Ibid., 42.

<sup>8</sup> Sean McGrane, *Katrina, Federalism and Military Law Enforcement: A New Exception to the Posse Comitatus Act*, Michigan Law Review 108, no 7, May 1, 2010, 1321.

<sup>9</sup> US Constitution, art I, cl. 15.

<sup>10</sup> Mathews, *The Posse Comitatus Act and the United States Army: A Historical Perspective*, 7.

<sup>11</sup> Daniel Crockett, *The Insurrection Act and Executive Power to Respond with Force to Natural Disasters*, <http://www.law.berkeley.edu/library/disasters/Crockett.pdf>, (accessed November 11, 2010), 5.

<sup>12</sup> Thaddeus Hoffmeister, *An Insurrection Act for the 21<sup>st</sup> Century*, [http://works.bepress.com/thaddeus\\_hoffmeister/6/](http://works.bepress.com/thaddeus_hoffmeister/6/), August 24, 2009, (accessed November 11, 2010), 12-15.

<sup>13</sup> Mathews, *The Posse Comitatus Act and the United States Army: A Historical Perspective*, 12.

<sup>14</sup> Hoffmeister, *An Insurrection Act for the 21<sup>st</sup> Century*, 14-15

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<sup>16</sup> Law Brain, *Disaster Relief*, [http://lawbrain.com/wiki/Disaster\\_Relief](http://lawbrain.com/wiki/Disaster_Relief), (accessed December 12, 2010).

<sup>17</sup> Jason David Rivera and DeMond Shondell Miller, *A Brief History of the Evolution of United States' Natural Disaster Policy*, Journal of Public Management and Social Policy vol. 12, is. 1, (2006). <http://www.jpmsp.com/volume12issue1> (accessed December 18, 2010).

<sup>18</sup> Federal Emergency Management Agency, *Robert T. Stafford Disaster Relief and Emergency Assistance Act P.L. 93-288, as amended*, FEMA PowerPoint Briefing, <http://www.ncs.gov/tpos/esf/homestead/3%20-%20Bearden-Stafford%20Act.ppt> (accessed December 18, 2010)

<sup>19</sup> McGrane, *Katrina, Federalism and Military Law Enforcement: A New Exception to the Posse Comitatus Act*, 1324-1325.

<sup>20</sup> Elizabeth C. Borja, *Brief Documentary History of the Department of Homeland Security 2001-2008*, History Associates Incorporated for U.S. Department of Homeland Security History Office, Washington D.C., 2008, 12.

<sup>21</sup> Federal Emergency Management Agency, *FEMA History*, <http://www.fema.gov/about/history.shtm>, (accessed November 13, 2010).

<sup>22</sup> Borja, *Brief Documentary History of the Department of Homeland Security 2001-2008*, 25.

<sup>23</sup> 109<sup>th</sup> U.S. Congress, *John Warner National Defense Authorization Act for Fiscal Year 2007*, H.R. 5122 (Public Law 109-364), Washington D.C., October 17, 2006, 2404-2405.

<sup>24</sup> 110<sup>th</sup> U.S. Congress, *National Defense Authorization Act for Fiscal Year 2008*, H.R. 4986 (Public Law 110-181), Washington D.C., January 28, 2008, 325-326.

<sup>25</sup> Rivera and Miller, *A Brief History of the Evolution of United States' Natural Disaster Policy*, 5.

<sup>26</sup> U.S. President, Executive Order January 11, 2010, *Establishment of Council of Governors*, [http://www.whitehouse.gov/sites/default/files/2010executive\\_order.pdf](http://www.whitehouse.gov/sites/default/files/2010executive_order.pdf), (accessed September 29, 2010), 1.

<sup>27</sup> *Contingency Dual-Status Commander Concept*, PowerPoint Briefing by U.S. Northern Command, November 2, 2010.

<sup>28</sup> COL John T. Gereski, Jr. and LTC Christopher R. Brown, *Two Hats Are Better Than One: The Dual-Status Commander in Domestic Operations*, Army Law, June 2010, at 72, 73.

<sup>29</sup> Gereski and Brown, *Two Hats Are Better Than One: The Dual-Status Commander in Domestic Operation*, 73.

<sup>30</sup> *Contingency Dual-Status Commander Concept*, PowerPoint Briefing by U.S. Northern Command, November 2, 2010.

<sup>31</sup> In a telephone conversation between LTC William J Prendergast and COL John T. Gereski, USNORTHCOM Director of Operations Law, concerning the Dual Status Commander Concept and Posse Comitatus, December 18, 2010. The barrier to command simultaneously is from U.S. Supreme Court, *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990)

<sup>32</sup> Prendergast and Gereski, TELCON. It is important to note that the design of DSC is to protect the Title 32 role in Posse Comitatus and not have a legal challenge and decision that places forces in a Title 32 Status under the Posse Comitatus Act as Title 10 forces.

<sup>33</sup> John Goheen, *Historic Response*, National Guard Magazine, Washington D.C., October 2005, vol. 59, is. 10, <http://www.ngaus.org/content.asp?bid=982&False>, (accessed September 15, 2010).

<sup>34</sup> In a conversation with LTC William J Edwards, who was assigned as the S-3 Air in the 41<sup>st</sup> eSB during the brigade's deployment to Hurricane Katrina

<sup>35</sup> Ibid.

<sup>36</sup> *Contingency Dual-Status Commander Concept*, PowerPoint Briefing by U.S. Northern Command, November 2, 2010.

<sup>37</sup> Carl Von Clausewitz, *On War*, trans. and ed. Michael Howard and Peter Paret. (Princeton, NJ: Princeton University Press, 1989) 119-121.

<sup>38</sup> Headquarters, Department of the Army, *Field Manual 3-28 Civil Support Operations (Final Approved Draft)*, Washington D.C., June 29, 2010, 7-1 – 7-6. When compared to the USNORTHCOM Concept Brief.

<sup>39</sup> Federal Emergency Management Agency, *About the National Incident Management System*, <http://www.fema.gov/emergency/nims/AboutNIMS.shtm> (accessed November 13, 2010).

<sup>40</sup> U.S. Department of Homeland Security, *National Response Framework*, <http://www.fema.gov/NRF>, Washington D.C., January 2008, 11.

<sup>41</sup> Headquarters, Department of the Army, *Field Manual 3-28 Civil Support Operations (Final Approved Draft)*, 2-1 – 2-2

<sup>42</sup> Federal Emergency Management Agency, *Incident Command System (ICS)*, <http://www.fema.gov/emergency/nims/IncidentCommandSystem.shtm#item3> (accessed November 14, 2010).

